Office Supreme Court, U.S.
FILED
OCT 2 1964
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 543.

NICHOLAS deB. KATZENBACH, as Acting Attorney General of the United States, et al.,
Appellants,

v.

OLLIE McCLUNG, SR., et al.,
Appellees.

Appeal from the United States District Court for the Northern District of Alabama.

BRIEF FOR APPELLEES.

ROBERT McD. SMITH,
JAMES H. FAULKNER,
WILLIAM G. SOMERVILLE,
Attorneys for Appellees.

LANGE, SIMPSON, ROBINSON & SOMERVILLE,
Exchange Security Bank Building,
Birmingham, Alabama,
Of Counsel.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

INDEX.

	Page
Opinion Below	1
Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Questions Presented	2
Statement	3
Substantiality of Questions	4
Summary of Argument	5
Argument:	
I. Title II in its general plan and as applied to appellants is not a valid exercise of the power of Congress under the commerce clause	8
1. For Congress to regulate an intrastate activity it must be shown that there is close and substantial relationship to interstate commerce	8
2. Neither the Agricultural Adjustment Act of 1938 nor Wickard v. Filburn is a precedent for upholding Title II	12
3. The National Labor Relations Act is not a statutory precedent	14
4. Title II applies to conduct which does not affect commerce	18
(a) The Interstate Traveler presumption is invalid	19
(b) The Food presumption is invalid	21
5. The effect on commerce is related to a restaurant's operations not racial segregation	25

6. Title II was not concerned with market impact but with social problems 27
7. The decision and opinion of the Court below are correct 28

II. Title II of the Civil Rights Act violates the due process clause of the 5th Amendment 30

III. The district court properly exercised its Equity jurisdiction 36

Conclusion 42

Cases Cited.

Adler v. Board of Education, 342 U. S. 485 37
A. L. A. Schechter Poultry Corp. v. United States, 295 U. S. 495 10
Bates v. Little Rock, 361 U. S. 516 33
Beal v. Missouri Pacific R. R., 312 U. S. 45 39
Bell v. Maryland, ... U. S. ..., 12 L. Ed. 2d 822, 858 32
Boynton v. Virginia, 364 U. S. 454 20
Browder v. Gayle, 142 F. Supp. 707, 715 (M. D. Ala.) (per Rives, J.) aff'd per curiam 352 U. S. 903 33
Buchanan v. Warley, 245 U. S. 60, 74 .....31, 34, 74
Butts v. Merchants Transportation Co., 230 U. S. 126 29
Carter v. Carter Coal Co., 298 U. S. 238 .....37, 41
Cincinnati v. Cincinnati & Hamilton Traction Co., 245 U. S. 446 41
Cleveland v. Cleveland City Ry. Co., 194 U. S. 517, 531 .....41, 42
Currin v. Wallace, 306 U. S. 1 .....34, 37
Detroit v. Detroit Citizen Street Ry. Co., 184 U. S. 368, 378-81 42
Douglas v. Jeannette, 319 U. S. 157 38

Elizabeth Hospital, Inc. v. Richardson, 269 F. 2d 167 (8th Cir. 1959) 20
Euclid v. Ambler Realty Co., 272 U. S. 365, 386 41
Florida v. United States, 282 U. S. 194 9
Garifine v. Monmouth Jockey Club, 29 N. J. 47, 148 A. 2d 1 35
Gibson v. Florida Legislative Committee, 372 U. S. 539 33
Gibbons v. Ogden, 9 Wheat. 1 8
Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co., 227 Fed. 46, 48 (C. A. 2) 32
Greene v. McElroy, 360 U. S. 474 31
Houston, E. & W. T. R. Co. v. United States, 234 U. S. 342 .....9, 10
Howard v. Illinois Central R. R. Co., 207 U. S. 463 .. 8
Hygrade Provision Co. v. Sherman, 266 U. S. 497 ..38, 39
International Ass'n of Machinists v. Street, 367 U. S. 740 33
Louis K. Liggett Co. v. Baldrige, 278 U. S. 105, 111 31
Meyer v. Nebraska, 262 U. S. 390, 399 31
Nance v. Mayflower Tavern, 106 Utah 517, 150 P. 2d 773, 776 (Utah) 35
N. L. R. B. v. Fainblatt, 306 U. S. 601 17
NLRB v. Jones & Laughlin Steel Corp., 301 U. S. 1 .. 16
NLRB v. Reliance Fuel Oil Corp., 371 U. S. 224 24
Palmer v. Massachusetts, 308 U. S. 79 9
Pennsylvania v. West Virginia, 262 U. S. 553 .....37, 41
Perkins v. Lukens Steel Co., 310 U. S. 113, 127 ... 32
Peterson v. Greenville, 373 U. S. 244, 250 32
Pierce v. Society of Sisters, 268 U. S. 510, 525. .31, 32, 37, 41
Poe v. Ullman, 367 U. S. 497 37
Polish National Alliance v. N. L. R. B., 322 U. S. 643 .....9, 17

Public Utilities Comm'n of California v. United States, 355 U. S. 534 37
Railway Mail Ass'n v. Corsi, 326 U. S. 88 37
Spielman Motor Co. v. Dodge, 295 U. S. 89 38
Terminal Taxicab Co. v. Kutz, 241 U. S. 252, 256 .. 32
The Civil Rights Cases, 109 U. S. 3 29
Tot v. United States, 319 U. S. 463 .....6, 19
Traux v. Corrigan, 257 U. S. 312 31
United Public Workers v. Mitchell, 330 U. S. 75 37
United States v. Darby, 312 U. S. 100 8
U. S. v. Yellow Cab Co., 332 U. S. 218 20
Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 12 38
Watson v. Bush, 313 U. S. 387 39
West Virginia State Board of Education v. Barnette, 319 U. S. 624 .....27, 33
Wickard v. Filburn, 317 U. S. 111 ....5, 7, 10, 12, 13, 27, 40
Williams v. Howard Johnson's Restaurant, 268 F. 2d 845, 847 (C. A. 4) 20, 35
Yonkers v. United States, 320 U. S. 685 9
Yu Cong Eng v. Trinidad, 271 U. S. 500, 526-27 31

Statutes Cited.

7 U. S. C. 1281, et seq. 5, 11, 12
29 U. S. C. 151, et seq. 11, 15, 23
28 U. S. C., § 2282 40

Miscellaneous Cited.

Hearings, Senate Judiciary Committee 27, 28
Charles A. Reich, "The New Property," 73 Yale Law Journal 733, 771 (1964) 33

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 543.

NICHOLAS deB. KATZENBACH, as Acting Attorney General of the United States, et al.,
Appellants,

v.

OLLIE McCLUNG, SR., et al.,
Appellees.

Appeal from the United States District Court for the Northern District of Alabama.

BRIEF FOR APPELLEES.

JURISDICTIONAL STATEMENT.[1]

OPINION BELOW.

The opinion of the United States District Court for the Northern District of Alabama, is not yet reported. A copy of that opinion is attached to appellants' jurisdictional statement (Appendix A) and is not reproduced in this brief.

[1] Pursuant to the Joint Motion to Expedite Briefing and Oral Argument, filed on September 24, 1964, appellees state herein their response to appellant's jurisdictional statement filed on September 28. Since under that motion simultaneous opening briefs are required on October 2, no statement of facts has been made by appellants. The facts are succinctly stated in the lower Court's findings. Appellants' Jurisdictional Statement, Appendix A, at pp. 7-9.

JURISDICTION.

Appellants' statement relating to the jurisdiction of this Court is accepted as correct except that portion thereof which confines the decision and opinion of the District Court to a restaurant which serves food a substantial portion of which has moved in commerce. Since the holding of the District Court was to the effect that Title II of the Civil Rights Act of 1964 as applied to the business operated by appellees was beyond the competence of Congress and that Court's opinion is presented on this appeal, it is not deemed necessary to interpret further the lower Court's holding.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The appellants' statement of constitutional and statutory provisions involved is accepted by appellees.

QUESTIONS PRESENTED.

Appellees consider appellants' statement of questions presented inadequate. Additional questions are presented as follows:

3. Whether Title II of the Civil Rights Act of 1964 is constitutional insofar as it relates to restaurants.

4. Whether Title II of the Civil Rights Act of 1964 is constitutional insofar as it relates to places of public accommodation generally.

STATEMENT.

Appellees accept appellants' statement with the following exceptions:

1. Appellants state that "the gravamen of the complaint is that appellees' business is 'essentially local in character' ". Appellees consider that the gravamen of their complaint is that Title II of the Civil Rights Act of 1964 is unconstitutional as applied to them.

2. Appellants state that "the government's motion to dismiss asserted that 'no case or controversy' was presented within the meaning of Article III of the Constitution". The record will reveal that no such ground or language was asserted in the motion to dismiss (R. 16-17).

3. Appellants further state that such motion asserted "that appellees were not threatened with any injury sufficient to justify the exercise of equity jurisdiction". The motion contained no such assertion or language (R. 16-17).

4. Appellants state that the holding of the District Court was "premised upon its view that, although a substantial portion of the food served by the restaurant is obtained through interstate channels, it comes to rest before being sold by the restaurant and hence is no longer subject to federal regulation under the commerce clause". Appellees consider that the opinion of the District Court speaks for itself, but strenuously challenge the foregoing statement and insist that the holding of the District Court was not premised upon any such view. To the extent that it is appropriate for a party to undertake in the statement of a case to interpret the holding of the lower Court appellees state that the decision below was premised upon the view that Title II of the Civil Rights Act of

1964 was drafted so as to regulate by virtue of a conclusive presumption conduct which in many instances will not affect interstate commerce at all.

THE QUESTIONS ARE SUBSTANTIAL.

Appellees accept appellants' statement as to the substantiality of the questions presented.

SUMMARY OF ARGUMENT.

It is appellees' contention that Title II of the Civil Rights Act of 1964, both as to appellees and to restaurants generally, is unconstitutional.

Conceding that Congress has the power to regulate local and wholly intrastate activities under certain circumstances, appellees contend that such power may be exercised only where it is shown that there is a close and substantial relationship with interstate commerce. In Title II, Congress has employed statutory means which result in application of the statute to local activities over which Congress has no authority by virtue of the commerce clause.

In the Agricultural Adjustment Act of 1938, 7 U. S. C. 1281, et seq., the constitutionality of which was upheld by this Court in **Wickard v. Filburn**, 317 U. S. 111, Congress determined, inter alia, that the regulation of producer consumed wheat was necessary in order to effectuate the overall plan and purpose of the legislation, i. e., to stabilize prices through the control of the supply and demand of the farm commodities covered.

The statute, in its application to wholly local and intrastate activities of the kind presented by Filburn's case was upheld by this Court on the basis of congressional findings that such local production and consumption, in supplying a need which would otherwise be reflected by purchases in the open market, would have a substantial effect on interstate commerce. The case recognized that a finding of such a cumulative effect on commerce was within the competence of Congress.

Title II of the Civil Rights Act of 1964 shows on its face that it was not conceived or drafted so as to come within the rationale of Wickard v. Filburn. It contains

no legislative findings and the provisions of the Act itself reject the implication of such since it purports to apply only to individual restaurants found to "affect commerce".

Another statute regulating local matters which has been relied upon by the proponents of the Civil Rights Act of 1964, is the National Labor Relations Act, 29 U. S. C. 151, et seq. In that statute Congress provided for the regulation of labor disputes which in most instances would be purely local and only indirectly related to interstate commerce. Recognizing this, Congress provided for a case-by-case determination of an effect on commerce by either the National Labor Relations Board or the courts. Unlike the Agricultural Adjustment Act, it did not purport to depend upon a finding of a cumulative effect of multiple local activities upon interstate commerce. The Labor Act sought to bring the power of Congress to bear only upon labor disputes found on a record to affect commerce.

When Title II purports to apply, so as to present a superficial resemblance to the National Labor Relations Act, only to those activities which "affect commerce", it employs what the Court below has characterized as "sophisticated means" to short circuit and eliminate any inquiry as to an actual effect on commerce in the individual case. This is accomplished by a conclusive presumption that the operations of a restaurant affect commerce if, first, it serves or offers to serve interstate travelers or, second, a substantial portion of the food which it serves has moved in commerce.

Neither aspect of this conclusive presumption can be sustained. See **Tot v. United States**, 319 U. S. 463.

Furthermore, in Title II, it is not required that there be any connection (even on the basis of the conclusive

presumption mentioned) between the racial policy of a particular restaurant and interstate commerce. Instead, the "affect commerce" technique is keyed to the "operations" of the restaurants generally. This technique, if approved, allows Congress to exert unlimited control over commercial and personal conduct which might not in fact affect commerce at all.

Since Title II of the Civil Rights Act of 1964 was not conceived as an interstate commerce measure, but rather to solve what was considered to be a serious social problem, its legislative history understandably contains no basis for the kind of findings that would have been necessary to sustain this legislation on the basis of the rationale of **Wickard v. Filburn**, supra.

Because of the means employed, Title II of the Civil Rights Act of 1964, as applied to appellees and to restaurants generally, does not fall within the legitimate limits of the commerce power granted to Congress. Since it necessarily encroaches upon the rights of appellees and other restaurant owners to use their property and to furnish their services in the manner they choose, it violates the 5th Amendment of the Constitution.

Since this record shows that appellees have failed to comply with pertinent provisions of Title II in specific instances and since appellants have indicated a firm intention to enforce the provisions of the Act, no serious question can be raised that appellees are entitled to injunctive relief.

ARGUMENT.

I. Title II in Its General Plan and as Applied to Appellants Is Not a Valid Exercise of the Power of Congress Under the Commerce Clause.

Appellees do not contend that Congress may not legislate with respect to racial discrimination. Nor do they contend that it may not, acting under the commerce clause, prohibit racial segregation in certain places of public accommodation, including many restaurants.

What they do contend is that Congress has in Title II of the Civil Rights Act of 1964 undertaken to regulate some restaurants (including appellees') over which it has no authority under the commerce clause; that it is, therefore, unconstitutional both as to appellees and as to restaurants generally. **Howard v. Illinois Central R. R. Co.**, 207 U. S. 463.

1. For Congress to Regulate an Intrastate Activity It Must Be Shown That There Is a Close and Substantial Relationship to Interstate Commerce.

There can be no question that Congress has the power to regulate local and intrastate activities that are not themselves a part of, but which are reasonably related to, interstate commerce. While such a power is not expressly given under the Constitution, it has been recognized as reasonably implied since at least **Gibbons v. Ogden**, 9 Wheat. 1.

The question then is not whether such a power over local activities exists, but whether this legislation has been enacted within its proper limits.

In **United States v. Darby**, 312 U. S. 100, this Court stated:

> The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it so as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce (312 U. S. at 118, 119).

Thus the Court recognized that the power under the commerce clause extends to those intrastate activities which are sufficiently related to justify their regulation in carrying out the purpose of the commerce clause, i. e., the regulation of interstate commerce per se. But the courts have also recognized that where purely local and intrastate activities are involved, there must be a "suitable regard" to the principle that in such cases the justification for regulation must clearly appear. **Yonkers v. United States**, 320 U. S. 685, and cases there cited; **Florida v. United States**, 282 U. S. 194; **Palmer v. Massachusetts**, 308 U. S. 79; **Houston, E. & W. T. R. Co. v. United States**, 234 U. S. 342; see concurring opinion of Justice Black in **Polish National Alliance v. N. L. R. B.**, 322 U. S. 643.

The principle that the regulation of a purely local activity requires a clear showing that such a regulation is appropriate to carrying out the primary power of Congress to regulate interstate commerce is deeply embedded in our law and represents nothing more than a recognition that, since all federal power must derive from the Constitution, matters which are not within an express grant of congressional power cannot be touched by federal hands unless it be shown that the regulation is necessary and proper in the exercise of a power expressly given. Where the interstate commerce clause is relied upon there must be at least a substantial and close effect on commerce.

It has been said that the effect must be "direct", that "indirect" effects are not covered. In this connection we might appropriately recall the words of Justice Cardozo, concurring in **A. L. A. Schechter Poultry Corp. v. United States**, 295 U. S. 495, where he stated:

> There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce. Motion at the outer rim is communicated perceptibly, though minutely, to recording instruments at the center. A society such as ours "is an elastic medium which transmits all tremors throughout its territory; the only question is of their size." Per Learned Hand, J., in the court below. The law is not indifferent to considerations of degree. Activities local in their immediacy do not become interstate and national because of distant repercussions. What is near and what is distant may at times be uncertain. (295 U. S. 559.)

It is not contended here that there is any magic in the word "direct." Inevitably it becomes a question of degree. In **Wickard v. Filburn**, 317 U. S. 111, the Court stated as to this point:

> In some cases sustaining the exercise of federal power over interstate matters the term "direct" was used for the purpose of stating, rather than of reaching, a result; in others it was treated as synonymous with "substantial" or "material"; and in others it was not used at all. Of late, its use has been abandoned in cases dealing with questions of federal power under the commerce clause.
>
> In the Shreveport Rate Case **(Houston E. & W. T. R. Co. v. United States)**; 234 U. S. 342, the Court held that railroad rates of an admittedly intrastate character and fixed by authority of the state might, nevertheless, be revised by the Federal Government

> because of the economic effects which they had upon interstate commerce. The opinion of Mr. Justice Hughes found federal intervention constitutionally authorized because of "matters having such a **close and substantial** relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the maintenance of the conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance." (Emphasis added.) 317 U. S. 111.

Many other examples of the Courts' recognition of this principle can be found, but it may fairly be stated that the relationship must be at least "close and substantial". To repeat for emphasis, it is the federal power to regulate local and intrastate activities and not the regulation of interstate commerce per se that is relevant here.

The concept of cause and effect is involved. In some way, at some point, a casual relationship between the particular local activity and interstate commerce must be shown. In some statutes the relationship has been found and shown in the legislation itself, e. g., Agricultural Adjustment Act of 1938, 7 U. S. C. 1281, et seq. In others provision is made for a case by case determination that the local activity "affects commerce". National Labor Relations Act, 29 U. S. C. 151, et seq.

These two classic examples of federal control over local matters have been repeatedly pointed to by the proponents of the Civil Rights Act of 1964 as statutory precedents and presumably will be relied upon by the appellants here.

Because it is a major contention of the appellees that neither of these statutes represents a precedent for Title II of the Civil Rights Act of 1964 it is deemed appropriate, in the interest of clarifying appellees' position, to examine those statutes both in structure and effect be-

fore turning specifically to the provisions of the 1964 legislation.

2. **Neither the Agricultural Adjustment Act of 1938 Nor Wickard v. Filburn is a Precedent for Upholding Title II.**

The Agricultural Adjustment Act of 1938 represents a type of statute in which Congress legislatively finds that certain local activities, although separately perhaps having no perceptible effect on interstate commerce, in their cumulative total so affect it as to bring them within the scope of federal power.

That statute did not contemplate a determination of an effect on commerce on a case by case basis. The power of Congress under that statute to reach intrastate conduct emanated from its deliberate and specific findings that certain local activities had to be controlled to implement the over all plan of the legislation, the stabilization of the prices of various agricultural commodities. No less than eight separate and lengthy findings relating to interstate commerce and the interrelation of the markets, etc. were included in the act. 7 U. S. C. 1311, 1321, 1331, 1341, 1351, 1357, 1379(a) and 1380.

The statute, of course, was involved in **Wickard v. Filburn**, 317 U. S. 111. In that case, Mr. Filburn raised the question of whether the act could constitutionally apply to excess wheat grown on his own farm for his own consumption. This Court upheld the application to Filburn's activity even though local, on the ground that Congress had determined that such wheat, in supplying a need which would otherwise be reflected by purchases in the open market, would have a substantial economic effect on interstate commerce.

Neither the statute nor the decision provide any procedure for the judicial or administrative determination of an effect on commerce in an individual case.

Merely reading Title II of the Civil Rights Act of 1964 discloses that insofar as restaurants are concerned, no anology between the Agricultural Adjustment Act of 1938 and the Civil Rights Act of 1964 can be drawn. The pertinent portions of Title II repudiate the idea that they were conceived on any such basis. Aside from the fact that Congress made no legislative findings whatsoever, the body of the statute itself is totally incompatible with a presumed finding that racial discrimination in restaurants generally has such a cumulative effect upon commerce as to bring the regulation thereof within congressional power in the manner illustrated in **Wickard v. Filburn**, *supra*. Whether Congress could have made any such findings need not here be considered. Suffice it to say that appelleees can find nothing in the legislative history of this legislation that would have supported any such finding if such had been made. Appellants' brief will presumably urge that testimony of various kinds before congressional committees would have justified such a finding, but it will be noticed that most of this fell into two categories: that relating to the difficulty with which Negroes plan and make interstate trips and that relating to the effect on business generally of the riots of 1963. Neither type of testimony could reasonably be said to support such a finding as would be required to bring this statute within the teaching of **Wickard v. Filburn**.

More important, however, is the fact that the Civil Rights Act of 1964 does not even purport to be based upon any such finding for it rejects the concept of a cumulative effect on commerce entirely and, instead, seeks to touch only such racial exclusion in individual restaurants as is found to "affect commerce" (in a proceeding involving the individual restaurant). It is thus patterned on statutes quite different from the Agricultural Adjustment Act of 1938. If it be argued that, in the absence of specific legislative findings, this Court should look to the

enacting provisions of the statute itself to see if it may fairly be said that Congress found that segregation in restaurants generally had such a cumulative effect, the answer manifestly would be negative. Whatever its undisclosed intention in this regard might have been, Congress did not on the face of this legislation purport to apply it to **all** restaurants. No such legislative finding can, therefore, be found lurking in the statute itself.

3. The National Labor Relations Act Is Not a Statutory Precedent.

The National Labor Relations Act, enacted earlier, was conceived on a different theory. In structure and effect it differed significantly from the Agricultural Adjustment Act. If the cumulative effect concept was embedded in it anywhere, it was only to the extent that it might have influenced Congress generally to deal with the problem of labor unrest. The enacting portions of the statute were drafted to reach only those labor disputes (questions of representation or unfair labor practices) that might, either judicially or administratively, be determined, on a case by case basis, to "affect commerce".

There are many obvious reasons why Congress would use a different approach in the National Labor Relations Act, on the one hand, and in the Agricultural Adjustment Act of 1938, on the other. In the latter, it was dealing primarily with the control of commodities, most of which regularly and inevitably flowed through the channels of commerce. The act was not primarily concerned with the regulation of local activities which might or might not, in fact, have an appreciable effect upon interstate commerce. The local matters regulated were found to be inseparably related to the interstate aspects which received the primary attention of Congress. Their regulation was merely incidental to the larger problem. In the National

Labor Relations Act, on the other hand, the basic purpose of the act was to regulate relationships between employer and employees which in the overwhelming majority of cases would be purely local and only indirectly related to interstate commerce in any way.

Recognizing the inescapable fact that a labor dispute involving a particular employer might or might not have a close and substantial effect on commerce, Congress was careful to assure that it would apply only where it might be determined **on a record** that the labor dispute would actually affect commerce, i. e., in the individual case.

Section 9 (c), provided for employee elections, required the National Labor Relations Board to:

> . . . investigate such petition and if it has reasonable cause to believe that a question of a representation **affecting commerce** exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof. 29 U. S. C. A. 159 (c). (Emphasis added.)

In Section 10 (a) it was provided:

> The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 158 of this title) **affecting commerce**. 29 U. S. C. A. 160 (a) (Emphasis added).

In both sections it was required that there be a finding, upon a record, that the specific matter regulated in the individual case affected commerce.

The source of the federal power originated in the term "affecting commerce". It was not, however, the mere use of the term that validated the act. Rather, it was the factual determination in each individual case that commerce was indeed involved.

In discussing the term "affecting commerce", this Court in **NLRB v. Jones & Laughlin Steel Corp.**, 301 U. S. 1, stated:

> This definition is one of **exclusion as well as inclusion.** The grant of authority to the Board does not purport to extend to the relationship between all industrial employees and employers. Its terms do not impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce. It purports to reach only what may be deemed to burden or obstruct that commerce and, **thus qualified**, it must be construed as contemplating the exercise of control within constitutional bounds. • • • Whether or not particular action does affect commerce in such a close and intimate fashion as to be subject to federal control, and hence to lie within the authority conferred upon the Board, is left by the statute to be determined as individual cases arise. We are thus to inquire whether in the instant case the constitutional boundary has been passed. 301 U. S. at 31-32 (Emphasis added).

It appears that the constitutionality of the act was upheld by this Court because it was "thus qualified", i. e., so as to apply only to those relationships between employer and employee that, in fact, affected interstate commerce. May it not be reasonably supposed that if it had not been thus qualified, it would not have been upheld?

Significantly, in the National Labor Relations Act Congress used the full sweep of its power under the com-

merce clause. **Polish National Alliance v. N. L. R. B.**, 322 U. S. 643; **N. L. R. B. v. Fainblatt**, 306 U. S. 601.

It is clear that the proponents of the Civil Rights Act of 1964, before congressional committees and in the debates in Congress, relied primarily upon the precedent of the National Labor Relations Act and the decisions under it to sustain their contentions regarding the constitutionality of Title II. The "affects commerce" technique was employed seemingly for that specific purpose. It is appellees' contention, however, that in Title II there has been a fatal abandonment of any bona fide use of the "affecting commerce" concept as was embodied in the National Labor Relations Act and a substitution therefor of a wholly unsupported conclusive presumption that conduct affects commerce when, in fact, it may not do so at all.

Appellees do not contend that in order for a statute to be constitutional, it must be precisely patterned on an earlier statute which the courts have upheld. It is, after all, by the Constitution and not by prior legislation that congressional enactments must be measured. However, where the constitutionality of the statute in question has been the subject of nationwide discussion by both bench and bar, where it has been debated at historic length by informed and sincere members of Congress and where the proponents of the legislation have repeatedly pointed to another act and the cases under it to support constitutionality, it is believed to be entirely appropriate that the two statutes be laid side by side and examined together. If the former does not, thus compared, represent a precedent for the latter, then the arguments of the proponents are at least rendered far less persuasive. Appellees submit that neither the National Labor Relations Act nor the cases decided under it furnish any support to the constitutionality of Title II.

4. Title II Applies to Conduct Which Does Not Affect Commerce.

This brings us to an examination of Title II as it relates to this case. The pertinent portions are as follows:

> Sec. 201. (a) All persons shall be entitled to the full and equal enjoyment of the goods, services, * * * of any place of public accommodation, * * * without discrimination or segregation on the ground of race, color, religion, or national origin.
>
> (b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title **if its operations affect commerce**, or if discrimination or segregation by it is supported by State action:
>
> * * * * * * * *
>
> (2) any restaurant, * * *
>
> * * * * * * * *
>
> (c) the operations of an establishment affect commerce within the meaning of this title if * * * (2) [in the case of a restaurant] it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; (Emphasis added.)

First, restaurants are declared to be places of public accommodations if their operations "affect commerce".[2]

Second, the operations of a restaurant "affect commerce" if:

(a) it serves or offers to serve interstate travelers, or

(b) a substantial portion of the food which it serves has moved in commerce.

---

[2] Omitting the reference to state action with which we are not here concerned.

Although the magic words, "affect commerce" are used, they are immediately rendered nugatory by the imposition of an exclusive and inflexible presumption that commerce is affected if either of two other facts are shown. The Court below aptly referred to this as a "sophisticated" technique (R. 48). Since this device is at least novel, it is appropriate for this discussion to paraphrase Title II as it applies to appellees and to other restaurants. This was done by the Court below in the following terms: ". . . . no restaurant may refuse service to any person because of his race, color, religion or national origin either if it serves or offers to serve interstate travelers or a substantial portion of the food which it serves has moved in commerce." The words "affect commerce" are effectually erased.

It may be fairly observed that, unless a policy of racial exclusion in every restaurant of the United States which falls within one of these two tests would necessarily have an actual effect on interstate commerce, Congress has in this statute legislated a presumption in which there may be no connection between the fact proved and the fact inferred. See **Tot v. United States**, 319 U. S. 463, at 467-68. Whether a rebuttable presumption to that effect could be upheld is a question not presented here. In this statute it is manifestly a conclusive one. Judicial inquiry as to whether there is an actual effect upon commerce in each individual case has been legislatively foreclosed.

Unless the conclusive presumption thus legislated is valid as applied to every restaurant throughout the nation, Congress has regulated activity over which it has no authority and the statute cannot meet the constitutional test.

(a) **The Interstate Traveler Presumption Is Invalid.**

In a sense, the interstate traveler presumption is not involved in this case since the record shows that appellees

serve no transients and it is not likely that appellants will contend that it in any way applies to appellees.

The Court below, noting that no case had been called to its attention and it had found none which "held that the national government has the power to control the conduct of people on the local level because they may happen to trade sporadically with persons who may be traveling in interstate commerce indicated it, like the food presumption, is invalid.

Indeed such authority as might be considered to bear upon this point supports that position. See **U. S. v. Yellow Cab Co.**, 332 U. S. 218; **Williams v. Howard Johnson's Restaurant**, 268 F. 2d 845 (4th Cir. 1959); **Elizabeth Hospital, Inc. v. Richardson**, 269 F. 2d 167 (8th Cir. 1959).

In **Boynton v. Virginia**, 364 U. S. 454, this Court stated:

> We are not holding that every time a bus stops at a wholly independent roadside restaurant the Interstate Commerce Act requires that restaurant service be supplied in harmony with the provisions of that Act. We decide only this case, on its facts, where circumstances show that the terminal and restaurant operate as an integral part of the bus carrier's transportation service for interstate passengers. 364 U. S. at 463.

Appellees do not suggest that the above language is directly applicable to the Civil Rights Act, but merely wish to show that even under the Interstate Commerce Act it has never been held that sporadic contact with interstate passengers brings the statute into play.

A major difficulty with this test lies in the language used. It is impossible to determine to what restaurants it would apply. Since "serves" and "offers to serve" are stated in the disjunctive, one must necessarily assume that a restaurant which has never served, and prospectively would never expect to serve, an interstate traveler,

would be covered if it merely "offered" to do so. Presumably, this would apply to a restaurant located far from the paths of interstate traffic if, in making a general offer to serve the public, it was willing to serve a traveler if one should appear. Further confusing is the term "interstate traveler". Congress has not stated what it means, whether it refers to one who is in the immediate process of traveling from one state to another and who after receiving nourishment immediately resumes his journey or, perhaps, to one who, while out of his home state for several days, happens to visit a local restaurant for a meal.

Regardless of how these terms might be interpreted in a given case, it is manifest that they would apply to individual restaurants which, in fact, have no effect on commerce at all on any previously recognized theory. If this be true, the presumption, being conclusive, cannot be sustained.

(b) **The Food Presumption Is Invalid.**

We have been unable to find in the legislative history that Congress gave any consideration whatsoever to, or even had any testimony bearing upon, an effect on commerce being generated by a restaurant's serving of food which **has** moved in commerce. Although committee reports were documented with various statistics furnished by the Department of Commerce, we know of none relating to movements of food across state lines or any impact upon that movement resulting from racial segregation in restaurants. Aside from that, however, it is clear that the mere fact, standing alone, that a restaurant serves food, which at some time in the past crossed a state line, would not in every case necessarily justify the conclusion that its racial policy would have an actual effect on commerce.

The draftsmen of the Civil Rights Act seem to have been impressed by the fact that in some cases the National

Labor Relations Board has based its jurisdiction upon evidence that goods sold or consumed reach the employer from some point out of state. In such cases, the Board, admonished by Congress to find in each individual case that the specific activity affects commerce, has determined in effect that since the employer has in the past purchased out of state goods, it may be reasonably inferred that it will continue to do so in the future and, therefore, an interruption of business would have an effect upon commerce. All of the cases under the National Labor Relations Act that may be cited by appellants here, support the obvious observation that it is prospective, not past, commerce with which Congress may be constitutionally concerned. In the Civil Rights Act of 1964, the conclusive presumption legislated deals solely with food that "has" moved in commerce. A particular restaurant might well fall squarely under the terms of this statute, when, in fact, its current activities will not affect commerce at all.

While the language of the act speaks for itself, it is clear that its proponents intended to key the food test to a past movement in commerce rather than a present or future one. In testifying before the Senate Judiciary Committee Attorney General Kennedy stated that restaurants generally would be covered under the act,[3] and with respect to the food test had this to say:

> **Senator Ervin**: I will assume that the restaurant has a skillet and some pork and beans which at **some time in the past** moved in interstate commerce.
>
> I will go so far as to assume that a substantial part of his cooking apparatus and his tables and chairs and his food moved in interstate **at some time**

[3] The Attorney General testified specifically concerning the Senate bill (S1731) rather than the House bill which ultimately became the present Civil Rights Act of 1964. However, the term "has moved in [interstate] commerce" was used in both bills.

between the ratification of the Constitution and the day he is called on for the service.

With that assumption, would you answer the question?

Attorney General Kennedy: What kind of an establishment is it, Senator?

Senator Ervin: A restaurant.

Attorney General Kennedy: A restaurant that serves food would be covered. (Emphasis added.) Hearings, Senate Judiciary Committee, at 191.

The point of course is that relating coverage to cases where food has in the past moved in commerce on a conclusive presumption such as this ignores the fact that the particular restaurant may not have any further connection with out of state food whatsoever. The statute was not written so as to apply to restaurants serving food which normally and regularly moves in commerce or that may reasonably be expected to move in commerce in the future.

It must be recalled that in determining whether particular labor disputes affect commerce the National Labor Relations Board, by statute, operates under an elaborate administrative procedure. For example, under § 160 of Title 29, U. S. C., testimony at the hearing must be reduced to writing and the Board is required to make findings upon the "preponderance of the evidence". In the event of review by a Court of Appeals, the Board's findings of fact are conclusive, "if supported by substantial evidence on the record considered as a whole". Among the facts thus determined by the Board are those relating to its own jurisdiction, i. e., that the dispute affects commerce. If, therefore, the Board's findings are rejected by the Court of Appeals it must be on the ground that they were not supported by substantial evidence. If the Board finds, for example, that the unfair labor prac-

tice involved affects commerce and the Court of Appeals refuses to enforce the Board's order on jurisdictional grounds, this Court looks only to see if there is substantial evidence to support the Board's jurisdictional findings. If so, they are conclusive and the Court of Appeals is reversed.

In a typical case of this kind, **NLRB v. Reliance Fuel Oil Corp.**, 371 U. S. 224, this is exactly what happened. The evidence showed that Reliance's operation was local; that it bought fuel oil from Gulf which Reliance in turn sold locally to its customers; that Gulf was in interstate commerce and that the oil sold to Reliance was delivered to Gulf from outside the state. The Trial Examiner found an effect on commerce. The Board adopted his findings. The Court of Appeals for the Second Circuit denied enforcement on the ground that the "meager record" did not tell it enough about the volume of oil in the relevant market. The case was remanded for more evidence. The Supreme Court reversed. While the case was not treated in the opinion in terms of the substantial evidence rule, the holding was inevitably that the record showed substantial evidence to support the Board's findings and that remand was not necessary.

Notwithstanding the claims of its proponents and of appellants the Civil Rights Act of 1964 presents a radical departure from the rationale of the Labor Board cases. Merely because the Labor Board has been upheld in a particular case, in finding a substantial effect on commerce where goods have moved across state lines before reaching an employer, does not mean that there will be such an effect as a matter of law in every case. If the Board should find in a different case that although goods have moved across state lines in the past, there can be no rational inference that a labor dispute will have an effect on commerce (perhaps because of other factors making up the entire

situation), the Board would be upheld in that finding (provided, of course, that there is substantial evidence to support it). The ultimate fact to be determined is an effect on commerce. An antecedent movement of goods across state lines is merely evidentiary, i. e., it may support an inference of an effect on commerce from the current dispute.

In Title II Congress has thus legislated that which has been relied upon as evidence in some cases into a conclusive presumption in all cases. This technique may be "sophisticated" as noted by the Court below, but it is also fatal where the ultimate fact thus presumed is indispensable to the constitutionality of the attempted exercise of congressional power.

5. The Effect on Commerce Is Related to a Restaurant's Operations, Not Racial Segregation.

In Title II the "affect commerce" device is keyed to the "operations" of places of public accommodations rather than to the racial policy sought to be controlled. Apart from the objections heretofore discussed, this technique, if validated, would convert the commerce clause into a federal general welfare power under which Congress could encroach upon personal liberty and property to a degree never heretofore imagined.

This is because the statute does not require that the racial policy of the individual restaurant affect commerce (as was done with respect to labor disputes in the National Labor Relations Act). It is enough that its operations generally do so. If this is approved by this Court, then an inevitable corrolary is that Congress may regulate other phases of the restaurant's activities.

To illustrate, it is abundantly clear that the purpose of this act was to "correct injustice" or solve a problem

of "human dignity". It was not conceived as a measure to promote interstate commerce. Now whether the purposes sought were good or bad is not relevant to the issue with which we are concerned. Surely the proponents and the Congressional majority which approved the legislation were sincere and conscientious Americans whose opinions in this respect may not be disregarded. But if Congress under the pretext of exercising its commerce power can effectuate social changes by this sophisticated means, where does its power stop? If all that is necessary is to find that a restaurant's operations "affect commerce", and then the way is open to carry out any purpose thought desirable by a Congressional majority, no matter how remote from commercial affairs as normally considered, then our federal system has undergone an alarming change. If saying that a citizen's activities or business operations "affect commerce" justifies regulating him in one respect, then why not in other respects?

This result would not be restricted to restaurants. Any business could be similarly regulated. More important, individual persons are subject to the rationale. All persons' activities have some theoretical or philosophical effect on interstate commerce. Since individuals consume food, their personal activities could be regulated.

The possibilities are unlimited. Under such power, Congress could even enact legislation to encourage larger families. Certainly it would not be difficult to have someone from the Commerce Department testify before a congressional committee that there is a national interest in population growth. Common experience tells that with more people there will be more commerce. This is not intended to be frivolous. If Congress can attain its intended purpose by the means employed in this statute, radically different from those employed in any other statute governing intrastate activities, then it must, hence-

forth, be to Congressional restraint alone and not to the Constitution that Americans must look for the preservation of their personal liberty.

Those favoring the Civil Rights Act of 1964 may say that those things have not happened yet, but we recall the words of this Court in **West Virginia State Board of Education v. Barnette**, 319 U. S. 624, that "our Constitution was designed to 'avoid these ends by avoiding these beginnings."

6. Title II Was Not Concerned With Market Impact, But With Social Problems.

Appellees recognize that in many instances Congress has exercised its power under the commerce clause to accomplish purposes not immediately related to interstate commerce such as the protection of morals, health, etc. It is not contended that it may not be motivated by such considerations. However, such a motivation may throw significant light upon the constitutionality of a statute where it is sought to be upheld on an analogy with the Agricultural Adjustment Act of 1938 and the rationale of **Wickard v. Filburn.**

Attorney General Kennedy, perhaps the principal proponent of this legislation, in testifying before the Senate Judiciary Committee, stated that he would not advocate the legislation except for "injustice" towards the Negro population, Hearings, Senate Judiciary Committee, 229.

The idea that the legislation was designed to remedy conditions leading to demonstrations and which might in turn affect commerce is repudiated by the following additional testimony of the Attorney General:

> ". . . But the reason that we need this legislation —that is what the question is, whether the legislation

> is needed—the reason it is needed is not because there are demonstrations taking place but because there are injustices that should be remedied and the legislation would take a step toward remedying those injustices." Hearings, Senate Judiciary Committee, at 110.

That the Act was not prompted by congressional interest in interstate commerce is further demonstrated by the considerable difficulty with which the advocates of the legislation agreed upon on its constitutional basis. The Attorney General preferred the commerce clause. Dean Griswold suggested the 13th Amendment. Senator Dodd favored the 14th Amendment. The constitutional basis was in fact, secondary to pressing the legislation through Congress. This is revealed by the following statement of Senator Dodd during the same hearings before the Senate Judiciary Committee:

> I do not know why we have to fuss about it. If the 14th Amendment will help, let's take it. If the commerce clause will help, let's follow it on that. If there are any other provisions of the Constitution which will help, let's have them all in. I do not see why we have any argument on it, myself. Hearings, Senate Judiciary Committee, at 162.

In view of the legislative background, it is difficult to see how it can be seriously argued that Congress was concerned with, or made implied findings with respect to, any impact on interstate markets as was done, for example, in the Agricultural Adjustment Act. Certainly no express findings were made.

7. The Decision and Opinion of the Court Below Are Correct.

Where simultaneous briefs are filed it is difficult to anticipate the argument of appellants. Recognizing this,

the Court has permitted the filing of supplemental briefs in this case following oral argument. It has been appellees' intention in this brief primarily to place before the Court its major contentions as simply and briefly as possible. Further argument may be required in a supplemental brief.

Appellants have suggested that the three-judge district court opinion was based upon a paragraph (R. 48), stating in effect that goods cease to constitute a part of interstate commerce when they are sent into a state either for the purpose of sale or in consequence of a sale and become a part of that state's property. While a reading of the entire opinion below will reveal that the district court's decision was not based upon that proposition, it is appropriate to point out, without elaborate argument here, that it is entirely adequate summation of pertinent authorities insofar as any issue in this case is concerned. The district court recognized, as do appellees, that Congress has the power to regulate local matters, wholly intrastate, which are not part of the stream of interstate commerce. Indeed this entire case must necessarily be decided in the context of that power. Where commerce proper starts and ends is not relevant here. Surely it ends somewhere. The district court stated the proposition mentioned in connection with its conclusion that it is prospective commerce to which attention may be given in regulating wholly intrastate activities (R. 44, 45).

The district court did not rely upon **The Civil Rights Cases**, 109 U. S. 3, except to observe that but for this court's opinion in **Butts v. Merchants Transportation Co.**, 230 U. S. 126, it would have more than persuasive authority. Appellees have refrained from urging the Civil Rights Cases as primary authority for their position in this case, but not because of any doubt as to the persuasiveness of Mr. Justice Bradley's observation that "no one will contend that the power to pass [the Civil Rights Act] was

contained in the Constitution before the adoption of the last three amendments [Thirteenth, Fourteenth and Fifteenth]". In the dissenting opinion in that case it was apparent that the commerce clause was in fact urged, at least with respect to one of the cases involving an interstate traveler on a railroad. The commerce clause was considered and the above language is highly persuasive.

In conclusion appellees would reiterate that they do not contend Congress does not have broad powers under the commerce clause. Admittedly it does. Nor are they unmindful of the presumption in favor of the constitutionality of a statute. On the other hand, many statutes have been declared unconstitutional by this Court. The powers of Congress under the commerce clause have not expanded. For the better part of two centuries this Court has stood as the ultimate citadel in the protection of individual liberty and private property. It is not with the slightest degree of reluctance that appellees urge this Court to hold that Title II of the Civil Rights Act of 1964 is unconstitutional both as to them and as to restaurants generally.[4]

II. Title II of the Civil Rights Act Violates the Due Process Clause of the Fifth Amendment.

It has been shown that Title II of the act, insofar as it applies to restaurants, transcends the legislative power of Congress under the commerce clause because of the means which the act employs to accomplish the purposes which it seeks—that is to say, by legislating a conclusive presumption of an effect on commerce when there may be none. Because the act upon its face thus exceeds the power—the legislative jurisdiction—of Con-

[4] Since the record shows that no "state action", as defined in Title II, influenced appellees' decision not to comply with the Act and since appellants have indicated that they will not claim this is involved in this case, this brief does not contain an argument on the 14th amendment aspect of Title II.

gress, the restrictions imposed by it upon restaurants necessarily deprive the restaurant owners of liberty and property without due process of law in contravention of the guaranties of the Fifth Amendment.

A basic impact of Title II of the act is upon the rights of private persons in the ownership, control and use of their property. It is an unavoidable fact that this legislation, to the extent which it provides, gives to the government and to other persons the right to exert control over the use of private property which otherwise would be reserved to the owner. The appellees' rights to their property and in their liberty to use it as they choose—rights which are expressly included within the due process clause of the Fifth Amendment—are diminished accordingly. These, personal liberty and private property, are rights which the Court has long deemed worthy of protection against encroachment by "the will of a legislative body without any restraint". See **Wilkinson v. Leland**, 2 Pet. 627, 657.

A person's business of course is a property right within the meaning of the due process clause. See, **e. g., Yu Cong Eng v. Trinidad**, 271 U. S. 500, 526-27; **Louis K. Liggett Co. v. Baldrige**, 278 U. S. 105, 111; **Traux v. Corrigan**, 257 U. S. 312; **Pierce v. Society of Sisters**, 268 U. S. 510; **Meyer v. Nebraska**, 262 U. S. 390, 399. **Cf. Greene v. McElroy**, 360 U. S. 474. And as observed by Mr. Justice Day in **Buchanan v. Warley**, 245 U. S. 60, 74, in reference to the scope of the protection of the Fourteenth Amendment, "Property is more than a mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it."

It long has been assumed that a businessman, as an incident of the right to use and control his property as he wishes, may deal or refuse to deal with whomever he pleases. Whether this incident of property ownership

is characterized as a property right or a liberty would not seem material. Thus, in the words of Mr. Justice Holmes in **Terminal Taxicab Co. v. Kutz**, 241 U. S. 252, 256, "an ordinary shopkeeper may refuse his wares arbitrarily to a customer whom he dislikes." It similarly has been remarked that it is a part of a man's civil rights that he be at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice. **Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.**, 227 Fed. 46, 48 (C. A. 2). Indeed, even the federal government, "like private individuals and businesses," enjoys the "unrestricted power" to determine those with whom it will deal. **Perkins v. Lukens Steel Co.**, 310 U. S. 113, 127.

Accordingly, the freedom of a business enterprise to select its patrons and customers is deemed a "liberty" within the protection of the due process guarantee. See, **e. g., Pierce v. Society of Sisters**, 268 U. S. 510, 525. Similarly, it has been considered that the liberty thus protected by the due process clause includes the freedom of the individual to be arbitrary in this right to select his customers. In the words of Mr. Justice Harlan in **Peterson v. Greenville**, 373 U. S. 244, 250 (concurring opinion):

> Underlying the cases involving an alleged denial of equal protection by ostensibly private action is a clash of competing constitutional claims of a high order: Liberty and equality. Freedom of the individual to choose his associates or his neighbors, to use and dispose of his property as he sees fit, to be irrational, arbitrary, capricious, even unjust in his personal relations are things all entitled to a large measure of freedom from governmental interference. This liberty would be overridden, in the name of equality, if the strictures of the amendment were applied to governmental and private action without distinction.

See, also, **Browder v. Gayle**, 142 F. Supp. 707, 715 (M. D. Ala.) (per Rives, J.) *aff'd per curiam* 352 U. S. 903 **Cf.** Charles A. Reich, "The New Property", 73 Yale Law Journal 733, 771 (1964).

The impact of the restraints imposed by Title II of the act upon these rights of appellees in the ownership and operation of that business is clear. The evidence in the district court was that in view of the location of appellees' restaurant and other factors, service of Negroes in accordance with the requirements of the act would damage the business "75 or 80 percent", thereby destroying its profitability (R. 78-79). The act's effect upon their liberty to serve or not serve whomever they choose is self-evident.

Even in a highly commercial context, a businessman has always possessed the right to deal with those he pleases, and for reasons personal to himself this right to exclude certain persons might and often does have real meaning to him. Thus appellees, in accordance with their personal convictions, have consistently refused to serve "a drunken man or a profane man" (R. 79). That the conviction of one may seem wrong in the eyes of others is immaterial; it is nonetheless a right of the one. Moreover, not dissimilar personal rights of persons in their personal convictions and in their choice of associates have been recognized and accorded constitutional protection by this Court. See, *e. g.*, **West Virginia State Board of Education v. Barnette**, 319 U. S. 624; **Bates v. Little Rock**, 361 U. S. 516; **International Ass'n of Machinists v. Street**, 367 U. S. 740; **Gibson v. Florida Legislative Committee**, 372 U. S. 539.

In sum, it seems plain that Title II of the act imposes upon restaurants within its coverage restraints on established rights of liberty and property which are entitled to constitutional protection.

These rights, as any others, of course, are not absolute and may be limited by legitimate governmental regulation, for as Mr. Justice Day remarked in **Buchanan v. Warley**, 245 U. S. 60, 74: "Property consists of the free use, enjoyment and disposal of a person's acquisition without control or diminution save by the law of the land." But it is axiomatic that the government's power to regulate is also not without its limits. Congress' commerce power, like its others, is subject to the restraints of the due process clause of the Fifth Amendment, **Currin v. Wallace**, 306 U. S. 1. Since it has exceeded its power in the enactment of Title II, the restraint imposed by it upon appellees' business deprives them of their rights of liberty and property without due process of law. For, as Mr. Justice Black said in **Bell v. Maryland**, ... U. S. ..., 12 L. Ed. 2d 822, 858 (dissenting opinion):

> [W]hen one party is unwilling, as when the property owner chooses not to sell to a particular person or not to admit that person, then . . . he is entitled to rely on the guarantee of due process of law, that is, "law of the land," to protect his free use and enjoyment of property and to know that only by valid legislation, passed pursuant to some constitutional grant of power, can anyone disturb this free use.

While it is possible that restaurants and cafes might be subject to some governmental regulation, they are subject only to such regulation as is within the scope of the power under which it is asserted. Only to this extent is there any permissible area of restraint on the rights of liberty and property protected by the Fifth Amendment. Accordingly, Title II insofar as it applies to appellees and restaurants generally imposes limitations that are unconstitutional.

Whether or not a particular business is one "affected with a public interest" or subject to a similar charac-

terization as the common law duty of innkeepers is irrelevant. The power of Congress to legislate the restrictions contained in Title II, insofar as pertinent here, is derived solely from the commerce clause. Its exercise in this instance purports to be based only upon the commerce clause. If the power of Congress under that clause is insufficient to accomplish what it has sought to do, there plainly is no other source upon which it can rely. For, if the doctrine of "businesses affected with a public interest" has any present vitality, it would, as to federal legislation, be applicable only to those objects of regulation which are in the first instance within the legislative powers of Congress conferred by the Constitution. But even as to state legislation the now discarded characterization of a business affected with a public interest has served only as a shorthand expression for the conclusion that a state's regulation was reasonable and within its power. And if a state had no legislative jurisdiction to exercise its police power, the doctrine of businesses affected with a public interest likewise would not extend that power. Furthermore, it has uniformly been declared that that doctrine has no application whatever to cafes, restaurants and similar establishments engaged only in the sale of food, and that restaurants, therefore, are free to exclude and deny service to anyone on whatever ground they wish. *E. g.*, **Williams v. Howard Johnson's Restaurant**, 268 F. 2d 845, 847 (C. A. 4); **Nance v. Mayflower Tavern**, 106 Utah 517, 150 P. 2d 773, 776 (Utah). **Cf. Garifine v. Monmouth Jockey Club**, 29 N. J. 47, 148 A. 2d 1.

For like reasons, decisions involving the constitutionality under the Fourteenth Amendment of anti-discrimination legislation enacted by states under the police power offer no support for appellants. This of course is because the power of a state under its police power to legislate in restraint of the rights of restaurant owners has, within the bounds of that state, no limits of territorial jurisdiction. Thus, it does not do to say that the authority of the

federal government over interstate commerce does not differ in extent of character from that retained by the states over intrastate commerce, since that assumes the answer to the critical question, that is, whether the scope of Title II and its regulation of these particular activities of local restaurants on the basis of goods which have moved at some time from out of state is a regulation of commerce at all. Consequently, any determination of questions of due process which may be involved with respect to similar state legislation affecting restaurants—a question which to our knowledge has not been decided by this Court—is entirely irrelevant to the issues here.

III. The District Court Properly Exercised Its Equity Jurisdiction.

In its application to appellees Title II of the act prescribes an affirmative duty in its command that they, as the owners and operators of a restaurant within the act's coverage, afford to all persons the equal enjoyment of the goods, services, and facilities offered in their restaurant. The refusal to comply with this duty is made unlawful, and the act authorizes actions to compel by injunction the performance of its requirements to be brought by private persons (§ 204(a)) and the Attorney General (§206(a)). Consistently since the law's enactment appellees have violated the act's prohibitions. On several occasions before commencement of this action groups of Negroes had entered their restaurant and requested service in accordance with the act's requirements, which appellees declined to provide. Only two days prior to the filing of this suit, a proceeding to enforce Title II was instituted by the Attorney General against some fifteen restaurant proprietors. The Attorney General certainly has at all times indicated a firm intention to enforce strenuously the provisions of Title II against all persons not in compliance. Only the actual institution by the Attorney General could have

made the controversy any more concrete than it was at the time the present suit was filed. It is true that appellants say that enforcement proceedings against appellees were not then contemplated, but private persons who were capable of enforcing the act had investigated appellees' policy of compliance. We are aware of no decision of this Court which has held under like circumstances that a "case or controversy" did not exist. Compare **United Public Workers v. Mitchell**, 330 U. S. 75, and **Poe v. Ullman**, 367 U. S. 497, with **Adler v. Board of Education**, 342 U. S. 485, and **Railway Mail Ass'n v. Corsi**, 326 U. S. 88.

In **Adler v. Board of Education**, *supra*, where teachers sought a declaration of the unconstitutionality of the Feinberg Law providing for the establishment of lists of subservise organizations and the disqualification of teachers who were members of such listed organizations, the Board when the suit was filed had announced only that it intended to publish the lists, but had not yet done so and plainly had not begun to enforce the law.

And where, as here, the issue is whether the plaintiff has the constitutional right to be free of the restraints imposed by a statute which has a present impact upon the right asserted by the plaintiff, it has been held that there was an actual controversy. **Public Utilities Comm'n of California v. United States**, 355 U. S. 534; **Currin v. Wallace**, 306 U. S. 1; **Carter v. Carter Coal Co.**, 398 U. S. 238; **Pierce v. Society of Sisters**, 268 U. S. 510; **Pennsylvania v. West Virginia**, 262 U. S. 553.

Thus, in **Public Utilities Comm'n of California v. United States**, *supra*, in which the United States sought to determine the constitutionality of a state statute prohibiting carriers from negotiating certain contracts with the government without the state commission's approval, the commission contended there was no justiciable controversy since there was no allegation that the commission had

done or threatened to do anything adverse to the government. Since the commission had indicated an intent to enforce the act and because the issue was whether the United States had the right to be free of the state control, a justiciable controversy was present.

The insistence of appellants that the Court below was without equity jurisdiction likewise is without merit. Their position, as we understand it, is that appellees have an adequate remedy at law in that they would be able to assert the act's unconstitutionality in defense of an enforcement suit provided by the act. Yet, in any number of cases federal courts have assumed jurisdiction to restrain the enforcement of laws despite a similar availability of an "adequate remedy" in the event of prosecution. For, "the remedy at law, in order to exclude a concurrent remedy at equity, must be as complete, as practical, and as efficient to the ends of justice and its prompt administration as the remedy in equity." **Walla Walla v. Walla Walla Water Co.**, 172 U. S. 1, 12.

This action involves a federal statute under which the federal district courts are granted exclusive jurisdiction of proceedings brought to enforce its provisions. If an enforcement proceeding were instituted against appellees, the suit would have been before the very court in which the present action was filed. With respect to the propriety of the exercise of equity jurisdiction, therefore, the posture of this case is vastly different from suits in federal courts to enjoin the enforcement of state criminal or civil statutes. There is involved no policy relating to the independence of courts in the dual system of our government which underlies the reluctance of federal courts to grant anticipatory relief from threatened state action except in the gravest of circumstances, as exemplified in such cases as **Douglas v. Jeannette**, 319 U. S. 157; **Spielman Motor Co. v. Dodge**, 295 U. S. 89; **Hygrade Provision**

Co. v. Sherman, 266 U. S. 497; **Watson v. Bush**, 313 U. S. 387; and **Beal v. Missouri Pacific R. R.**, 312 U. S. 45. As stated by Mr. Justice Stone in **Beal v. Missouri Pacific R. R.**, *supra*, a suit to enjoin enforcement of a state statute:

> This [the reluctance to restrain criminal prosecutions] is especially the case where the only threatened action is the prosecution in the state courts by state officers of an alleged violation of state law, with the resulting final and authoritative determination of the disputed question whether the act complained of is lawful or unlawful. [Citations omitted.] The federal courts are without jurisdiction to try alleged criminal violations of state statutes. The state courts are the final arbiters of their meaning and appropriate application, subject only to review by this Court if such construction or application is appropriately challenged on constitutional grounds. [Citations omitted.] Hence interference with the processes of the criminal law in state courts, in whose control they are lodged by the Constitution, and the determination of questions of criminal liability under state law by federal courts of equity can be justified only in most exceptional circumstances and upon clear showing that an injunction is necessary in order to prevent irreparable injury. [Citations omitted.] And in the exercise of the sound discretion, which guides the determination of courts of equity, scrupulous regard must be had for the rightful independence of state governments and a remedy infringing that independence which might otherwise be given should be withheld if sought on slight or inconsequential grounds. [Citations omitted.]

Obviously those considerations are not involved here, for if an enforcement action were brought the same district court would have determined the constitutional issues

presented. Compare **Wickard v. Filburn**, 317 U. S. 111, involving a federal statute, in which equity jurisdiction was exercised although the only apparent injury to the plaintiff would have been the collection of a penalty amounting to $117.11.

Nevertheless, the circumstances of this case are similar to those in which the grant of equitable relief to restrain threatened enforcement of **state** laws has been upheld. The basis of this action and the relief sought is that Title II of the act in its application to appellees' business and restaurants generally is unconstitutional. The act imposes upon their business a presently operative duty which is a restraint upon their business. Compliance with or enforcement of its requirements of course would seriously injure and probably destroy the business (R. 78-79). But beyond that, the existence and general enforcement of the act in itself would have an injurious effect upon the business by effectively encouraging Negroes to seek service in increasing numbers, which would adversely affect the continued patronage of appellees' predominantly family-group clientele, particularly if, as is quite possible, the refusal to serve them caused disturbances. Moreover, the enforcement procedures provided by the act are not as adequate as the remedy under 28 U. S. C., § 2282. Appellees testified that the filing by the Attorney General of an enforcement suit against Tuscaloosa restaurants two days before commencement of this suit was the chief reason this action was brought. This was "because I felt like if I were grouped with Howard Johnsons and Holiday Inn and other restaurants of that nature that I would have no opportunity at all to present my case as a local restaurant" (R. 90). In the Tuscaloosa suit brought under Section 206 against persons believed to be engaged in a pattern of resistance to the act, the Attorney General had included in a single complaint some fifteen restaurants of varying types. It

would indeed have been difficult, if not impossible, for appellees to adequately present their case in such a suit. In any event in a case such as this, where the gravamen of the suit is that the existence and maintenance of the challenged law constitutes a present invasion of the plaintiff's property rights, "the equitable jurisdiction is clear." **Euclid v. Ambler Realty Co.**, 272 U. S. 365, 386; **Pennsylvania v. West Virginia**, 262 U. S. 553; **Carter v. Carter Coal Co.**, 298 U. S. 238; **Pierce v. Society of Sisters**, 268 U. S. 510. See, also, **Cincinnati v. Cincinnati & Hamilton Traction Co.**, 245 U. S. 446. Thus, in **Pierce v. Society of Sisters**, *supra*, injunctions were held to be properly granted against legislation unlawfully interfering with the plaintiffs' selection of business patronage. **Cincinnati v. Cincinnati & Hamilton Traction Co.**, 245 U. S. 446, was a suit in Federal Court to enjoin on constitutional grounds the enforcement of an ordinance regulating plaintiff's street-car company. Much like the enforcement provisions of Title II, the ordinance provided further that if the company refused to comply, the city solicitor could institute proceedings to enforce its provisions. No penalties were imposed for failure to comply. The city questioned the Court's jurisdiction because enforcement of the ordinance could only be had through institution of a suit, until which time noncompliance would cause the company no injury. The company maintained the ordinance had a present effect. The Court, per Mr. Justice McReynolds, held that the equity jurisdiction was properly invoked.

The absence of criminal penalties under the act does not deprive the Court of equity jurisdiction, as is shown by **Cincinnati v. Cincinnati & Hamilton Traction Co.**, *supra*. This is all the more true when, as here, the statute confers upon members of the public individual rights of action against the party violating it, with the resultant possibility of a multiplicity of suits. See **Cleveland v.**

Cleveland City Ry. Co., 194 U. S. 517, 531, and **Detroit v. Detroit Citizens Street Ry. Co.**, 184 U. S. 368, 378-81.

It is submitted, in sum, that in the circumstances of this case the equity jurisdiction of the district court was properly invoked.

CONCLUSION.

It is respectfully submitted that the judgment should be affirmed.

ROBERT McD. SMITH,

JAMES H. FAULKNER,

WILLIAM G. SOMERVILLE,
Attorneys for Appellees.

Of Counsel:

LANGE, SIMPSON, ROBINSON
& SOMERVILLE,
Exchange Security Bank Building,
Birmingham, Alabama.